IN THE COURT OF APPEALS OF THE STATE OF ALASKA

WILLIAM GEORGE VEITENHEIMER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13324 Trial Court No. 3AN-16-05367 CR SUMMARY DISPOSITION No. 0267 — May 18, 2022

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael D. Corey, Judge.

Appearances: Bradly A. Carlson, The Law Office of Bradly A. Carlson, LLC, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Elizabeth T. Burke, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Harbison and Terrell, Judges.

William George Veitenheimer was convicted of second-degree burglary for breaking into a building on the HD Supply Waterworks campus in downtown Anchorage.[1] He raises two issues on appeal.

[1] AS 11.46.310. Veitenheimer was also convicted of violating his conditions of release under AS 11.56.757(a), but he does not challenge this conviction on appeal.

Veitenheimer first argues that the indictment was based on inadmissible and factually incorrect information and accordingly should have been dismissed.[2] This argument is based on a discrepancy between the police report of Officer Nathan Keays and his testimony at trial. In the police report, Keays wrote that he had "observed a male [later identified as Veitenheimer] jump out of [a] window" of the HD Supply Waterworks building. However, in his testimony at trial, Keays clarified that he did not actually see Veitenheimer jump out of the window — instead, he saw a window screen on the ground below the window, and Veitenheimer crouching beside it as if he had just landed. The testimony presented to the grand jury included the inaccurate statement from Keays's report that Keays had actually observed Veitenheimer jumping out of the window.

After Keays testified about his observations, Veitenheimer's attorney filed a motion to dismiss the indictment, but the trial court denied the motion as untimely because it was filed in the middle of trial. On appeal, Veitenheimer argues that this was an abuse of discretion, and that, had the court considered his motion on the merits, it would have succeeded. Because we conclude that the motion would not have succeeded on the merits, we affirm the court's decision on this basis and do not address Veitenheimer's claim that the trial court erred in denying the motion as untimely.

In deciding whether to dismiss an indictment because improper evidence was presented to the grand jury, the trial court must first subtract the improper evidence from the total case heard by the grand jury, and determine whether the remaining

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[2] Alaska R. Crim. P. 6(r)(4) (providing that if hearsay testimony presented by a peace officer before a grand jury "is inaccurate because of intentional, grossly negligent, or negligent misstatements or omissions, then the court shall dismiss an indictment resulting from the testimony if the defendant shows that the inaccuracy prejudices substantial rights of the defendant").

evidence is sufficient to support the indictment.[3] If the remaining evidence is sufficient, the court then asks whether "the probative force of [the] admissible evidence was so weak and the unfair prejudice engendered by the improper evidence was so strong that it appears likely that the improper evidence was the decisive factor in the grand jury's decision to indict."[4]

Here, when the improper evidence is subtracted from the total evidence presented to the grand jury, the evidence that remains is very strong: Veitenheimer immediately ran from police when he saw them; while running away, he abandoned two bags containing, among other things, an ice pick, a pry bar, a hammer, assorted jewelry, and paperwork belonging to people other than Veitenheimer; a search of the building revealed that someone had been inside the building rifling through desk drawers (although nothing was missing); and Veitenheimer later admitted to police that he had been inside the building. Given this evidence that Veitenheimer had been inside the building, it is unlikely that the discrepancy between Keays's police report and his trial testimony influenced the grand jury's decision to indict. We therefore affirm the trial court's denial of Veitenheimer's motion to dismiss the indictment.

Veitenheimer also challenges the trial court's decision to admit evidence of the contents of two bags Veitenheimer abandoned while being chased by police. Those bags contained a number of items that could have been used in a burglary (*e.g.*, a pry bar), as well as a number of items that appeared to have been stolen from some other location (*e.g.*, jewelry, electronics, and medical and unemployment paperwork that did not belong to Veitenheimer). On appeal, Veitenheimer argues that this evidence was

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[3] *Stern v. State*, 827 P.2d 442, 445-46 (Alaska App. 1992).

[4] *Id.* at 446.

impermissible propensity evidence under Alaska Evidence Rule 404(b)(1) because it tended to suggest that he had a propensity to commit theft.

While evidence of a defendant's prior bad acts is not admissible for the purpose of proving the defendant's propensity to commit bad acts, such evidence is admissible for other purposes, including to prove the defendant's intent.[5] Thus, evidence that the bags contained potential burglary tools and property that appeared to be stolen was relevant to establish Veitenheimer's intent to commit a crime when he entered the building.[6] Furthermore, during opening statements, Veitenheimer's attorney asserted that Veitenheimer entered the building only because he was unhoused and was looking for a place to sleep. The attorney claimed that the backpack Veitenheimer was carrying contained all of his belongings, including food and clothing. Evidence of the content of the bags — showing that the bags did not contain food or clothing but did contain items that likely did not belong to Veitenheimer — was relevant to disprove that assertion.

Veitenheimer makes two additional arguments about the evidence that are not well-developed. First, he claims that the State failed to demonstrate that items found in the bags were stolen and that, in the absence of such proof, the evidence was not probative of his state of mind at the time he entered the building. This presents an issue of conditional relevance under Alaska Evidence Rule 104(b). We conclude that the requirements of that rule were satisfied here because the evidence presented was sufficient for a reasonable juror to conclude that the items were stolen.[7]

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[5] Alaska R. Evid. 404(b)(1).

[6] *See* AS 11.46.310 ("A person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime in the building.").

[7] *See Bennett v. Anchorage*, 205 P.3d 1113, 1117 (Alaska App. 2009) (holding that (continued...)

Second, Veitenheimer claims that the court erred when it failed to balance, under Alaska Evidence Rule 403, the probative value of this evidence against the risk of unfair prejudice. But the record shows that Veitenheimer never asserted that the evidence was inadmissable under Rule 403. Furthermore, in response to Veitenheimer's arguments about Rule 404(b)(1), the trial court noted that the question was "whether or not it's undue prejudice, invoking concepts of Rule 403." We therefore conclude that, despite Veitenheimer's failure to object on Rule 403 grounds, the trial court nevertheless considered whether the probative value of the evidence was outweighed by the risk of unfair prejudice and implicitly ruled that it was not.[8]

The judgment of the superior court is AFFIRMED.

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[7] (...continued)
when the relevance of evidence hinges on resolution of a factual dispute, the judge should admit the evidence if there is sufficient evidence to allow the jury to reasonably conclude that fulfillment of the condition is established).

[8] Citing this Court's decision in *Douglas v. State*, Veitenheimer argues that a trial court is affirmatively required to conduct an explicit Rule 403 analysis on the record whenever it admits evidence under Rule 404(b). But in *Douglas*, the evidence in question was admitted under Rule 404(b)(4) to prove the defendant's propensity to commit domestic violence, and Douglas specifically objected to that evidence on Rule 403 grounds. *Douglas v. State*, 151 P.3d 495, 502-03 (Alaska App. 2006). Here, by contrast, the evidence in question was admitted for a non-propensity purpose under Rule 404(b)(1), and Veitenheimer did not specifically object on Rule 403 grounds. Under these circumstances, the court was not required to conduct an explicit Rule 403 analysis on the record.